

Ellsberg - Jones

RABINOWITZ, BOUDIN & STANDARD

ATTORNEYS AT LAW

30 EAST 42ND STREET

NEW YORK, N.Y. 10017

OXFORD 7-8640

VICTOR RABINOWITZ
LEONARD B. BOUDIN
MICHAEL B. STANDARD
JOAN GOLDBERG
DORIAN BOWMAN

MICHAEL KRINSKY
K. RANDLETT WALSTER

CABLE: RABOUDIN

430 NATIONAL PRESS BUILDING
14TH AND F STREETS N.W.
WASHINGTON, D.C. 20004
(202) 628-4047

October 31, 1972

To: D. D. Donovan
Leonard Weinglass
Peter Young
Charles Nesson
Charles Goodell
Mort Halperin

I have just received the enclosed jury analysis by Roger and Renee Gould which will be published in May and which we should, of course, not publish or release. It will be interesting to get your views on their views.

It is likely that the Supreme Court will decide the certiorari issue on Monday, November 6th. If certiorari is granted, then I, Charles Nesson and Eric Lieberman on this end will continue with our work in Russo v. Byrne and will quite early send a draft to Leonard Weinglass and Peter Young. On the other hand, by this time as a result of reading the petition and reply you may have opinions as to what should be put in the brief on the merits and, even more important to me, quite probably an outline of what you think our main brief in the Supreme Court should read like. In that connection, you should examine the appendix of wiretapping cases in our reply and adding any additional information which you think would be helpful on the brief in the Supreme Court. I would also appreciate your sending us all wiretapping information that you will be closer to than we in view of the grand jury proceedings now going on in San Francisco.

In the event that certiorari is denied, we, of course, do not know whether the Court will fix a trial date for November 13th, December 1st or January 1st. Whatever the date, preparation for the trial itself should now be accelerated since I assume all of us have been doing some work in preparation for the trial. What that work is it might be helpful for us to tell one another.

October 31, 1972

I see the following work to be done:

1. The National Defense Issue

We should have in a single volume the following materials:

(a) That part of the Pentagon Papers which the government claims in its Bills of Particulars to relate to national defense or foreign intelligence or anything else whose transmittal is claimed to be proscribed by the statute.

(b) The text of the identical or similar materials which appeared in the public domain prior to the events described in the indictment.

(c) The text of the identical or similar items which appeared in (i) the Gravel edition and (ii) in the Government Printing Office edition.

(d) The names of our expert witnesses with respect to each of these items.

(e) A written statement presumably secured by Mort or Charley from each of these witnesses as to what they would testify in support of our position that the materials relied upon by the government do not relate to national defense.

(f) A summary analysis stating conceptually what our argument will be in support of our experts' opinion or, where there is no expert opinion, in lieu of that opinion.

(g) An entire series of exhibits from newspapers, books, articles, etc. which we can introduce in evidence in support of our position on this issue.

(Some of this material has been the result of Mort's work over the last year or two, some must come from the witnesses who have been given the relevant volumes, some will come from Lennie's staff's files and some remains to be done presumably I think by Charles seeing witness in Cambridge, Washington and elsewhere.)

October 31, 1972

(I consider Dan's views on all of this material to be invaluable but I would defer reviewing it with him at this moment because I would like to get the other material in first and then have his views on it.)

2. Opening to the Jury

In July I gave each of you my proposed opening and asked for criticism. Let me urge you to read it again now that the pressure of the Los Angeles days is over for the moment and write me a critical comment indicating (a) what you think should be omitted; (b) what you think should be added; (c) what new approaches, philosophical we can call them, should be taken in the light of your further thought, the changed situation in the war and the election.

3. Motion for Change of Venue

As soon as the case is scheduled for trial and whether or not the present jury is discharged, it seems very important to me for us to make a motion for change of venue. This motion should be based upon the work done by Lennie and Peter and their group in assessing the jury venire (that is, the military and defense character) and upon some analysis of the Los Angeles area from which the jury is selected which would distinguish it from most if not all of the cities in the country. Here in New York we can get the census tracts for Los Angeles and we are attempting to gather some kind of picture from Congressional committees of the allocation of defense contracts but I suspect that you in Los Angeles can get a better picture from advertisements in the newspapers, from the brochures and financial statements and investor reports of the big aerospace and national defense plants, from aviation magazines which we can use to buttress our position that Los Angeles is a particularly unfair place in which to try this case. I don't know whether there have been right-wing radio programs, particularly virulent, but this might be pursued by you in an effort to distinguish Los Angeles from most other cities. All of this material as you get it should be sent to us here where Eric Lieberman is working on a motion for a change of venue. It is my recollection that Peter Young was doing a brief on the subject and that would, of course, be welcome.

The other argument for a change of venue lies in the expense aspect of living in Los Angeles and the need to bring all of our witnesses from the East. In this connection I suggest that Lennie send me a complete list of his proposed witnesses with their positions,

October 31, 1972

residences and offices and that Charles Nesson do the same. I shall, of course, not reveal these names to anyone but I want to know them before I can prepare a summarized statement of the number of witnesses, the expense involved and the inconvenience of present and past government officials.

4. Motion for Discharge of Jury

There is no precedent that we have been able to find to date (although it must exist) for the discharge of a jury that has been on leash, as the government puts it, for three or four months. Theoretically, one could argue that a jury which is not sequestered is also on leash and the question is, why should the rule be different when the jury is not listening to testimony but is going home to its family, friends and work? There is only one Third Circuit case, the Alkers case, which cast doubt upon leaving a jury in this open manner. We can do the legal research here but the question that remains is whether this jury has been subjected to pressures and prejudices by reason of the postponement of the trial and more particularly whether it will not blame us for the inconvenience caused it. There is also the delicate question of whether or not these jurors have been pressured by friends and family, whether they have attended public meetings for Nixon and Agnew, and whether they have made statements in the past three months with respect to Ellsberg and this case. This is, of course, a very delicate problem because we are not permitted to talk to the jurors themselves. I should like to leave this to Lennie and Peter to see what kind of information gathering can be secured on this subject.

There are further aspects of this: What do we know about these jurors now or what can we learn by the date of the opening of the trial that we did not know before? Assuming that we have three or four weeks for further research, should not the West Coast research group make an effort to gather more information about these jurors? This would have two purposes: First, to see whether the jurors stated untruths in their examination of the voir dire; second, so as to determine how strongly we feel about a change of venue and to guide us in the course of the trial if it is heard before that jury.

With respect to one of the jurors against whom we were compelled to exercise a peremptory challenge, we might try to gather further information about him, perhaps from him, which we could use to show the court that we should have had a challenge for cause.

October 31, 1972

On the other hand, if the judge persists in keeping this jury, we have the question of what kind of a further voir dire we want -- one which would not antagonize the present jury. I would like to have your views on that and we will be checking the law on it -- if there is any law.

5. Wiretapping

I have asked DeeDee to review the entire wiretapping issue and to prepare a memorandum assessing the inadequacies of the government's responses so that we could make a motion for a further disclosure. She is in the best position to do this, I think, because the wiretapping issue is a very large one in the grand jury proceedings in California. DeeDee will be able to assess the variety of government responses to demands for disclosure to see if we can find inconsistencies, inadequacies and gaps. This material could then be combined with the general study of wiretapping which Eric Lieberman made in connection with the petition in Russo v. Byrne, and on which he is continuing. I have asked him to gather from all the lawyers who are handling wiretapping cases xerox copies of their complete files dealing with this subject so that we can be fully prepared for the wiretapping fight. You will remember that Judge Byrne has declined to pass upon my request for extension of the wiretapping order to Victor Rabinowitz and to others. You may have other people on the defense team known to Lennie Weinglass and to Charles Nesson whom we may wish to include in a supplemental wiretap motion. In such case the information with respect to names, residence, telephone numbers, period of employment and functions should be sent to DeeDee and to me.

6. Bill of Particulars

The government has not had several more months to study this case and presumably has called in further experts to explain to it what items relate to national defense. Instead of giving us entire pages as they did, they should now be in a position to delineate the particular lines and phrases that they claim relate to the national defense. Then we ought to make a motion for such further delineation and support it by indicating the inadequacies of the present bills of particulars and possibly to tell the court the names of their additional experts, if we know them, so as to show why the government must know more than it did originally. On this end we shall look into the

October 31, 1972

bill of particulars problem to see whether there isn't authority for requiring the government not only to state what relates to national defense but more specifically in what manner. I seem to recall that earlier we pressed for a bill of particulars on this point and that the court rejected it. I will check our files. Herb Jordan of this office will be coordinating the national defense material in this office for me and we will send you everything that we have. We have gotten material from Lennie Weinglass, we have the pages of the Gravel edition which are not in the G.P.O. edition, but I don't think that this office has the research data accumulated by Mort which I would appreciate getting.

7. Kunkin

I know that Peter Young was on the brief in Kunkin. Could we have a report on the status of the case and could we have the briefs filed in the Supreme Court both by the state and Kunkin. I think Charles will want copies of these as well as this office.

8. Open Motions

Judge Byrne seems to have a habit of not deciding matters which he now justifies by arguing that the trial has been stayed. Among the open matters that I recall are the supplemental wiretapping motion (see above) and the motion to get the CIA memoranda. We will begin rechecking the transcript to see what else is open but I would appreciate your sending me a list of open items making reference to the transcript or to the date the motions were filed or the docket entries so as to facilitate our examination and to press the judge for a determination of those motions.

9. Additional Matters

Are there additional motions to be filed, new witnesses to be seen, new documents to be read, new arguments to be made? Could we exchange views on this?

10. Proposed Meeting

Some time after November 6th, soon if the Supreme Court denies certiorari, there should be a meeting of counsel either in the East or the West together with Mort Halperin and, if he is available, Dan Ellsberg. There are now three lawyers in California and there are three people, Mort, Charles Nesson and I, in the East. Before then

October 31, 1972

I will have talked to Charles Goodell to get an estimate from him on where we are.

11. The Friedman Case

I don't know whether we have ever gotten the briefs in the District Court and on the appeal in this case. If Peter and Lennie do not have them, would they get them and send them to us.

Forgive this long letter which I suspect is still incomplete but which will be helpful for the purpose of reminding us of the many things to be done in the next several months. I believe that we should fully prepare for trial even if the Supreme Court grants certiorari. It may be that some of you think the foregoing is unnecessary and that of you will have additional ideas which we want to exchange immediately.

Best,

Leonard B. Boudin

LBB:ma